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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/682,657	10/09/2003	Jack Polonka	J6860(C)	8243

201 7590 08/25/2006

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EXAMINER

LAMM, MARINA

ART UNIT PAPER NUMBER

1617

DATE MAILED: 08/25/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action  
Before the Filing of an Appeal Brief**

Application No.

10/682,657

Applicant(s)

POLONKA, JACK

Examiner

Marina Lamm

Art Unit

1617

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 01 August 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☒ The Notice of Appeal was filed on 01 August 2006. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

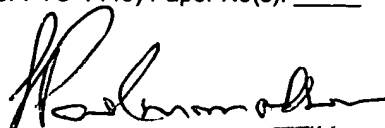
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 1-2  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

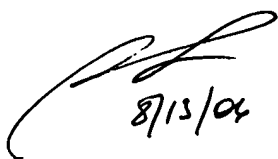
**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.



**SREENI PADMANABHAN  
SUPERVISORY PATENT EXAMINER**

Continuation of 11. does NOT place the application in condition for allowance because: The Applicant's arguments have been fully considered but not found persuasive. In response to the Applicant's arguments it is noted, the Cohen et al. reference teaches that the platelet compounds "should also exhibit some transparency, i.e. at least about 20% transmission of light, but generally no greater than about 70%." See [0010]. The passage is talking about a compound, not the entire composition, as suggested by the Applicant. Moreover, the compound referred to by the reference is the same as used in the instant invention, i.e. pearlescent interference platelet of bismuth oxychloride sold under the commercial name Biron B-50. With respect to the reference's teaching in paragraph [0016] ("As a rule, the remainder of the ingredients used in the formula should, in combination, exhibit a light transmission level in the range of from about 20 to about 70%"), this is merely a preferred embodiment, which does not constitute "teaching away". Furthermore, in the same paragraph, Cohen et al. teach that "it is preferred that the additional components be transparent or nearly so, so as to avoid opacifying the composition to such an extent that the sheer, natural effect is lost". This teaching simply cannot be ignored by the Applicant. Further, it is noted that the Applicant's claims recite an opacity of "less than about 20%". The term "about" indicates that there is no criticality associated with that number and the opacity can "a little more" or "a little less" than 20%. As discussed above, Cohen et al. teach that the light transmission of the compositions should be, as a rule (i.e. preferably), "from about 20 to about 70%". The teaching of "to about 70%" in the reference also encompasses the light transmission slightly over 70%, which meets the limitations of "opacity of less than about 20%" and "opacity of less than about 10%" in the instant claims. The Court in *General Foods Corp. v. Perk Foods Corp.* (DC NIII) 157 USPQ 14 held that the term "about" is entitled to latitude in characterizing feature which is not critical to distinction over prior art. Further, it is noted that Cohen et al. clearly teach compositions having "sheer, natural effect" and suggest "to avoid an overall opacity". See [0016]. "The compositions, when applied to the skin, have the effect of diminishing or eliminating the appearance of skin blemishes, while permitting surrounding clear skin to retain its normal, healthy appearance". See [0005].



8/13/04